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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 935

BOOMHOWER, INC.,

Petitioner,

vs.

H. G. FISCHER & CO., INC. and ALAN MATHIS,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

QUESTIONS PRESENTED.

Essentially, only one question is presented: did the Courts below err in determining that plaintiff's evidence was insufficient to sustain its claim?

STATEMENT OF THE CASE.

This suit, filed by the petitioner, Boomhower, Inc., a Delaware corporation, against respondents H. G. Fischer & Co. Inc., an Illinois corporation, and Alan Mathis, President of the latter corporation and a resident of Illinois, is an ordinary action predicated upon alleged breach of contract and tortious wrong. Except for the diversity of citizenship of the parties, the District Court would have

been without jurisdiction and the cause would have been triable only in a State Court. The case was tried in the District Court without a jury and, at the conclusion of the plaintiff's evidence, on motion of respondents which challenged the sufficiency of the plaintiff's evidence, the Court entered a finding for respondents and dismissed the action.

The Court of Appeals reviewed the record and stated:

> "After an examination of the entire record, we are satisfied that the evidence is wholly insufficient to sustain plaintiff on any of its theories of recovery." (Pet'n A-5)

For some time prior to October, 1950, D. W. Boomhower was a dealer in medical equipment in Washington, D.C. and acted as sales representative for various manufacturers of such equipment, including the respondent, H. G. Fischer & Co. Inc. of Franklin Park, Illinois. During October, 1950, T. G. Benton became interested in said Washington dealership business and caused the petitioner corporation to be organized for the purpose of acquiring and operating said business. On October 6, 1950, petitioner by letter notified respondents that the Washington dealership business had been transferred to it and assured respondents that there would be no material changes in operational details. By this letter respondents were requested to assure petitioner of the continuation of "our sales franchise with you and your continued support and cooperation." (Pltf's App. 14, 15).

A second letter was written by petitioner to respondent H. G. Fischer & Co. Inc., requesting assurance that the same dealer and cash discounts on all invoices would be allowed as under the old individual ownership, and also

that all advertising sent out by the factory for "our territory" would be under the name of Boomhower, Inc. (Petnr's App. 17, 18).

Respondent H. G. Fischer & Co. Inc. replied to the foregoing letters on October 12, 1950 by assuring the petitioner of the same discounts and terms that had theretofore been extended to the individual proprietorship and also assured petitioner of respondent's support and cooperation. The D. W. Boomhower business acquired by petitioner had operated under "a regular sales contract" with respondent H. G. Fischer & Co. Inc., embracing Washington, D.C. and certain counties in Virginia and Maryland contiguous to Washington. Respondents were first informed of the transfer of the Boomhower & Company proprietorship business to petitioner corporation by the letters above mentioned. (Defts' App. 1).

Respondent Alan W. Mathis, President of H. G. Fischer & Co. Inc., assumed that the purpose and effect of the exchange of letters between petitioner and respondent H. G. Fischer & Co. Inc. was to substitute petitioner as a party to existing "regular" sales contract in lieu of D. W. Boomhower, proprietor of the former Boomhower & Company business. (Defts' App. 2).

Subsequently, Ed Raney, a Vice President of petitioner, who formerly had been employed by D. W. Boomhower, addressed a letter to respondent Alan W. Mathis in which Raney stated that Mr. Benton appeared to have no conception of the surgical trade and had created a lot of dissension among the salesmen. By this letter Raney envisioned the complete disintegration of petitioner's sales organization and inquired whether Raney might hope to acquire the territory. (Pltf's Exh. 30).

Respondent H. G. Fischer & Co. Inc., under date of March 27, 1951, replied to Raney's letter as follows:

> "If as you state in your recent letter, it appears that Boomhower, Inc. as it is presently set up bids fair to disintegrate as to a proper sales force for our line and you feel that you can take over the line advantageously yourself, we, of course, are agreeable to turning over our representation to you." (Pltf's Exh. 31).

Later, under date of April 5, 1951, Ed Raney again wrote to respondent Mathis and described the dissension in the Washington dealership as an "open brawl." (Pltf's Exh. 33).

On April 9, 1951, respondent H. G. Fischer & Co. Inc. replied to the foregoing letter indicating that it would consider Raney for certain territory including Washington, after giving petitioner required notice. (Pltf's Exh. 34).

Respondent Mathis, called by petitioner as a witness, testified that the consideration given Raney with respect to the territory in question was subject to various "ifs," the "ifs" being: "if Boomhower, Inc. went to pots. If you lost all your sales force, and those things that he had mentioned," and further, "if your business dropped off to the point where we could no longer do justice to the company by continuing to do business with you, why, then I would have done it. I have got duties to the company." (Defts' App. 3).

Respondent Mathis, as petitioner's witness, further testified that there were a lot of "ifs" which never materialized and that Raney never had a franchise from H. G. Fischer & Co. Inc. in that territory. A new regular form of contract was submitted by respondent H. G. Fischer

& Co. Inc. to petitioner in October of 1951, which contract was subsequently cancelled on April 25, 1952. (Defts' App. 5). Thereafter, the franchise for the Washington area was given to District X-Ray Company. (Defts' App. 5, 6).

Respondents were informed by petitioner's letter of October 6, 1950, that the officers of the new corporation were: T. G. Benton, President; D. W. Boomhower, Vice President; Ed M. Raney, Vice President; and F. Benton, Secretary-Treasurer. Thus respondents were aware that Ed M. Raney was a corporate officer of the petitioner corporation but had no knowledge of an alleged "profit-sharing" contract of employment between petitioner as employer and Raney as employee. (Defts' App. 2).

Petitioner's attorney sought to introduce in evidence a purported letter of application for employment by Raney but, in response to an inquiry by the trial judge, stated that he did not believe the respondents knew about the application, whereupon the Court ruled the instrument inadmissible. (Defts' App. 10).

Ed Raney testified that he had determined to quit his employment with petitioner prior to writing Mr. Mathis and that his employment was actually terminated after the receipt by him of a letter from Mr. Benton materially curtailing his authority as an employee. Raney further testified that Mr. Benton had accused him of a lot of things and demanded the keys which he, Raney, thereupon threw upon the desk and then walked out. Later, Raney wrote a formal resignation as Vice President of the petitioner corporation, which was accepted. (Defts' App. 11).

In addition to the products of respondent H. G. Fischer & Co. Inc., petitioner handled medical and surgical instruments and equipment produced by other manufacturers,

including Hamilton Furniture, electric cardiogram and basal metabolism equipment, an item known as a microtherm, and an extensive laboratory line. (Defts' App. 12).

Mr. Thaddeus G. Benton, attorney for petitioner, sworn as a witness in petitioner's behalf, testified that Raney had misrepresented to him the profits and earning power of the Company under Raney's management, that he found Raney was totally unreliable as a manager, that Raney was not to be trusted in a managerial capacity, but that "we could control him strictly as a salesman and we needed his sales power." (Defts' App. 12, 13).

Mr. Benton further testified that he made no investigation as to the relation between the company he was buying and respondent H. G. Fischer & Co. Inc.; that he accepted Mr. D. W. Boomhower's—Ed Raney's promises to him in that respect and that he never saw any written contract there might have been. (Defts' App. 14). With respect to the occasion when Raney surrendered the keys, Mr. Benton testified that he said, "let's have the keys," and that Raney gave him the keys. (Defts' App. 14).

ARGUMENT.

I.

NO QUESTIONS OF LAW, EITHER STATE OR FEDERAL, ARE INVOLVED.

The Courts below were presented with one question only, namely: the sufficiency of petitioner's evidence to sustain his contentions. Both Courts performed this function in accordance with the accepted and usual course of judicial proceedings, and both Courts, after carefully analyzing the evidence, determined that it was inadequate.

The opinion of the trial judge, orally expressed, and the opinion of the Court of Appeals, definitely show that neither Court was presented with any substantial question of law but that the case as submitted required only that the evidence be considered and analyzed with regard to its sufficiency. The District Judge, who presided over the trial without a jury and who saw and heard the witnesses, determined that question adversely to petitioner, and the Court of Appeals, in an opinion indicating a careful study of the record, concurred in the trial court's decision.

Under the circumstances, petitioner is not in position to contend that the lower Courts erred in deciding any question of law or in the application of any settled proposition of law.

II.

THE COURTS BELOW CORRECTLY APPRAISED PETITIONER'S EVIDENCE AS INSUFFICIENT TO SUPPORT ITS CLAIM.

At the conclusion of the evidence, the District Court remarked:

> "It would appear to me that this law suit has been brought against the wrong people."

and this remark by the District Court was characterized by the Court of Appeals as an apt observation. (Pet'n A-6). The Court of Appeals further stated:

> "This would appear to be one of those unfortunate situations where a lawyer puts his money into a business in which he has had no experience; has an unhappy result and at least four unsuccessful managers; concludes he has been defrauded by a trusted associate but sues someone else; acts as trial and appellate counsel for his own plaintiff corporation; and feels compelled to testify as a witness in his own behalf. It all adds up to a situation to which he can never become reconciled." (Pet'n A-6)

The evidence abundantly supports the foregoing view reached by both the District Court and the Court of Appeals.

It is regrettable that the venture of Mr. Thaddeus G. Benton into the highly specialized medical equipment business, in which he had no previous experience, should have proved unsuccessful. However, his disappointment, and the apparent bitterness engendered by the episode, does not excuse petitioner's efforts to recover its alleged losses from respondents, who were in no way responsible for the failure of petitioner's business.

At the outset, Benton appears to have recognized the necessity of retaining employees experienced in the medical equipment field but, according to Raney, Benton inaugurated policies and methods which were not suitable to the conduct of the business which catered to members of the medical profession and hospitals. It is also clear that Benton failed to establish and maintain harmonious

relations not only with Raney, whom he regarded as a key man, but with members of petitioner's experienced sales force. As the dissension between Benton and his sales force increased, petitioner's sales naturally declined until the operation of the business ceased to be profitable. Respondents, as suppliers of medical equipment, were not concerned with the management or internal affairs of the petitioner corporation and did not interfere or attempt to interfere with petitioner's relations with its employees.

Raney, petitioner's Vice President, apparently apprehensive of his own future, reported a chaotic state of affairs in petitioner's organization to respondents and, upon the basis of such representations, suggested that respondents transfer the Washington franchise to him. Since respondents' legitimate business interests in the Washington territory were involved, respondents tentatively considered Raney's report. Respondents, however, did not cancel petitioner's franchise as requested by Raney, and although respondents later found it necessary to cancel the franchise, the Washington territory was not given to Raney but to a corporation with which Raney had no connection.

Although petitioner asserts that Raney, by reason of his prior experience and good record in the medical equipment field, was more or less indispensable to the success of petitioner's business, Benton himself testified that he discovered Raney lacked managerial capacity and that he therefore had employed another manager and sought to reduce Raney to the status of salesman. It appears that Benton's decision to remove Raney as manager and retain him in the capacity of a salesman resulted in a controversy between Benton and Raney during which Raney was discharged. Some time after Raney was so discharged, he

was employed by respondent H. G. Fischer & Co. Inc. in a capacity which had no connection with the Washington territory. It is therefore definitely established by the evidence that Raney was discharged by the petitioner and that petitioner's claim that it was deprived of Raney's services by reason of respondents' interference is unfounded.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

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